BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD

CENTRAL PUGET SOUND REGION

STATE OF WASHINGTON

TOWARD RESPONSIBLE DEVELOPMENT, ET AL, Petitioner, v. CITY OF BLACK DIAMOND, Respondent, And BD LAWSON PARTNERS, LP and BD VILLAGE PARTNERS, LP,[1] Intervenors.	**CASE NO. 10-3-0014** **ORDER ON MOTIONS**

On September 20, 2010, the Black Diamond City Council enacted Ordinance No. 10-946 and Ordinance No. 10-947 (Ordinances or Challenged Ordinances), both of which approved a Master Planned Development (MPD). Ordinance No. 10-946 approved the "Villages" Master Plan Development. The Villages MPD consists of approximately 1,196 acres and is proposed to be developed with a mix of uses, including residential and non-residential development. The anticipated residential development, both single and multi-family, is 4,800 units. Ordinance No. 10-947 approved the "Lawson Hills" Master Plan Development. The Lawson Hills MPD is comprised of approximately 371 acres and is proposed to be developed with a mix of uses as well. The maximum level of residential development, both single and multi-family, is to be 1,250 units.[2] All of the land contained within these two

[1] Intervenors are collectively referred to as YarrowBay.

[2] The information presented in this paragraph is contained in the Record as well as in various portions of the parties' briefing. *See e.g.,* Motions Exhibit 1; Motions Exhibit 2; Ordinances 10-946 and 10-947.

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MPDs is within the municipal boundaries of the City of Black Diamond, and thus, within the City's Urban Growth Area (UGA).

Petitioners, Toward Responsible Development, et al, filed a Petition for Review on November 19, 2010, challenging compliance with various provisions of the Growth Management Act (GMA), RCW 36.70A, and the State Environmental Policy Act (SEPA), RCW 43.21C. In addition to alleging non-compliance, Petitioners request the Board enter a Determination of Invalidity.

This present matter comes before the Board on several motions, both dispositive and procedural, filed by all of the parties. Dispositive Motions filed are:

- Toward Responsible Development's Dispositive Motion[3]
- Black Diamond's Dispositive Motion to Dismiss for Lack of Jurisdiction[4]
- YarrowBay's Motion to Dismiss[5]

Procedural motions filed are:

- Toward Responsible Development's Motion to Supplement the Record[6]
- Toward Responsible Development's Motion to Strike Improper Brief and Declaration[7]

Responses and replies were filed in regards to all of the above motions.[8]

I. PROCEDURAL MOTIONS

1. Board's Request for Documents from the Record

On January 31, 2011, the Board issued an order requesting that the City of Black Diamond provide it with two exhibits from the Record. The City filed the requested documents on February 3, 2011. These documents are noted as follows:

[3] Filed January 11, 2011 (Petitioners' Motion to Dismiss).
[4] Filed January 11, 2011 (Black Diamond Motion to Dismiss).
[5] Filed January 11, 2011 (YarrowBay Motion to Dismiss).
[6] Filed January 11, 2011 (Petitioners' Motion to Supplement).
[7] Filed January 31, 2011 (Petitioners' Motion to Strike).
[8] Filed January 21, 2011: Petitioners' Response to Dispositive Motions, YarrowBay's Response to Petitioners' Dispositive Motions, Black Diamond's Response to TRD's Dispositive Motions, Black Diamond's Response to TRD's Motion to Supplement; Filed January 27, 2011: Black Diamond's Reply to Dispositive Motion w/ Declaration of Sterbank, YarrowBay's Reply to Petitioners' Response to Dispositive Motions; Filed February 1, 2011: Black Diamond's Response to Motion to Strike; Filed February 3, 2011: Petitioners' Reply in Support of Motion to Strike.

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Motions Exhibit 1: Lawson Hills MPD Application (Record Exhibit 18)
Motions Exhibit 2: The Villages MPD Application (Record Exhibit 19)

2. Petitioners' Motion to Supplement

With its Motion to Supplement the Record, Petitioners request the addition of three exhibits:[9]

Exhibit A: Email from Mayor Olness to City Council
Exhibit B: Council Member Craig Goodwin Web Page
Exhibit C: Declaration of Brian Ross Opposing Petitioner's Motion to Stay Proceedings

The first two exhibits are related to Petitioners' public participation allegations; the third, to its request for invalidity.

Petitioners argue Exhibit A gives clarity to enforcement of the edict for no contact between the public and City Council during the MPDs' quasi-judicial approval process.[10] With Exhibit B the Petitioners assert the text of the webpage demonstrates the *ex parte* rules imposed frustrated the public process.[11] Petitioners contend Exhibit C should be admitted to demonstrate important insights into YarrowBay's vesting plans.[12]

In response, Black Diamond addresses only Exhibit A and B.[13] The City asserts these two exhibits provide little value to the Board's resolution of the issues before it and do not actually demonstrate "that the Mayor or others actually prevented any" off-the-record communication between the public and the City Council.[14] Black Diamond argues that should the Board choose to allow these exhibits, Exhibit E of the Sterbank Declaration (Sterbank Declaration I) should be included in the Record. [15]

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[9] Petitioner's Motion to Supplement at 1-3.
[10] Petitioners' Motion to Supplement, at 1-2.
[11] Petitioners' Motion to Supplement, at 2-3.
[12] Petitioners' Motion to Supplement at 3.
[13] YarrowBay did not respond to the Petitioner's Motion to Supplement.
[14] Black Diamond Response, at 1-2.
[15] Black Diamond Response, at 3. During the motions practice, the City filed two Sterbank Declarations. Sterbank Declaration I was filed in support of the City's Response to Petitioners' Dispositive Motion (January 21, 2011). Sterbank Declaration II was filed in support of the City's Reply on Petitioners' Dispositive Motion (January 27, 2011).

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In reply, Petitioners provide no new argument; but, while indicating there is little value in the contents of Exhibit E, did not expressly object to its inclusion. [16]

Board Discussion and Analysis

As permitted by RCW 36.70A.290(4) and WAC 242-02-540, the Board may supplement the Record with information that provides it with substantial or necessary assistance in resolving the legal issues presented.

The Board finds the information contained within Exhibit A and B have such value. Specifically, because Petitioners have raised issues which center on the City's adoption process for the MPDs and the interaction between the city council and members of the public prior to adoption of the challenged Ordinances, these exhibits would substantially assist the Board in that regard. **Petitioner's Motion to Supplement, in regards to Exhibit A and B, is GRANTED.** These exhibits shall be referenced as Supplemental Exhibit A and Supplement Exhibit B, respectively.

As for Exhibit C,[17] the Ross Declaration, the Board notes that it was created after the enactment of the challenged Ordinances and, generally supplementation with such documents is not permitted.[18] However, many of the statements made within this Declaration refer to facts available within the Record itself. In addition, the purpose of this Declaration is to demonstrate YarrowBay's continued progress toward fully vesting its developments - something that is directly related to any subsequent consideration of a Determination of Invalidity. Therefore, given these facts, Petitioners' Motion to Supplement, in regards to Exhibit C, is **GRANTED.** This exhibit shall be referenced as Supplemental Exhibit C.

Lastly, Black Diamond requested that if the Record is supplemented with Petitioners' Exhibits A and B then Exhibit E to Sterbank Declaration I should be supplemented as well to

[16] Petitioners' Reply at 1-4.
[17] The Board notes that neither Black Diamond or YarrowBay objected to the addition of this exhibit.
[18] *Friends of the San Juans v. San Juan County,* WW Panel Case 10-2-0012, Order on Motion to Supplement at 2 (July 8, 2010); *Pilcher et al v. City of Spokane*, EW Panel Case No. 10-1-0012, Order on Motion to Supplement at 2 (Dec. 30, 2010).

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provide rebuttal evidence. The Board finds the contents of Exhibit E will substantially assist it in addressing Petitioners' public participation claims and, therefore, Black Diamond's request to supplement the Record with Exhibit E to Sterbank Declaration I is **GRANTED**. This exhibit shall be referenced as Supplemental Exhibit E-SDI.

3. Petitioners' Motion to Strike

With its Motion to Strike, Petitioners assert the exhibits attached to the "Declaration of Bob C. Sterbank" (Sterbank Declaration II) filed with Black Diamond's Reply on Dispositive Motions are not part of the Record nor has the City filed a Motion to Supplement the Record.[19] The Petitioners argue these extra-record facts and the referencing sections of the City's Reply Brief should be stricken.[20] Exhibits to Sterbank Declaration II are:

Exhibit A: City of Kent Ordinance 3608 Planned Action Ordinance – Kent Station
Exhibit B: City of University Place Ordinance 469 Planned Action Ordinance – Town Center
Exhibit C: City of Seattle Ordinance 121041 – UW Campus Master Plan
Exhibit D: UW Campus Master Plan – Seattle Campus

In response, Black Diamond points out that the Board is expressly permitted to take official notice of adopted ordinances and, with the exception of Exhibit D, the materials attached to Sterbank Declaration II are adopted ordinances.[21] As for Exhibit D, the City contends that although it has been incorporated by reference within a city ordinance, the Board could also take official notice of this exhibit as a notorious fact.[22] Lastly, Black Diamond states that even if the Board were not to take official notice of these exhibits, it should supplement the Record because they would provide necessary or substantial assistance.[23]

Board Discussion and Analysis

Black Diamond is correct that the Board has the authority to take official notice and it is permitted, as it did *supra*, to supplement the Record with evidence it finds would be necessary or of substantial assistance. However, this is generally done when a party files a motion seeking supplementation and such motions are clearly provided for on the case

[19] Petitioners' Motion to Strike, at 1.
[20] Petitioners' Motion to Strike.
[21] Black Diamond Response to Motion to Strike, at 2-3 (citing WAC 242-02-660(4)).
[22] Black Diamond Response, at 3 (citing WAC 242-02-670(2)).
[23] Black Diamond Response, at 7 (citing WAC 242-02-540).

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schedule set forth in the Prehearing Order. Here, Black Diamond filed no such request prior to submitting a brief relying almost exclusively on evidence outside of the Record of these proceedings.

According to Black Diamond, the purpose of these exhibits is to support its assertion that the Board lacks jurisdiction for this matter. Sterbank Declaration II's Exhibit A and Exhibit B relate to Planned Action Ordinances (PAOs) that were at issue in prior Board proceedings - *2101Mildred* and *Kent CARES.*[24] However, there is no representation that Black Diamond's ordinances are PAOs adopted pursuant to RCW 43.21C.[25] Therefore, ordinances underlying a prior Board decision related to the enactment of PAOs would provide no assistance to the Board in the present case. Petitioners' Motion to Strike Sterbank Declaration II's Exhibits A and B and argument relying upon those exhibits contained within Black Diamond's Reply is therefore **GRANTED.**

As for Exhibit C and D, these also relate to prior Board proceedings – *Laurelhurst I* and *Laurelhurst II.*[26] Although a Master Plan was at issue in *Laurelhurst I*, the Board finds the terms and conditions reflected in the ordinance and master plan for the University of Washington's campus bear little or no relationship to Black Diamond's approved MPDs. As the parties are aware, the Board reviews each case based on the unique facts before it. Although prior Board holdings provide substantial guidance, the findings and conclusions set forth in the Board's order reflect the rationale for the holding. Thus, the Board finds Sterbank Declaration II's Exhibit C and Exhibit D would not be of substantial assistance in the present matter. Petitioners' Motion to Strike these exhibits and portions of the City's Reply Brief relying upon these exhibits is **GRANTED.** However, although these exhibits have been stricken, the Board will still consider the City's generalized arguments related to the *Laurelhurst* cases as those arguments pertain to findings and conclusions contained within the Board's orders for those cases.

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[24] *2101 Mildred LLC et al v. City of University Place,* CPSGMHB Case 06-3-0022; *Kent CARES v. City of Kent,* CPSGMHB Case 02-3-0015.
[25] *Davidson Serles et al v. City of Kirkland*, Court of Appeals No. 64072-1-1 (Jan. 24, 2011) Slip Opinion at 13, Fn. 7 (Growth Boards do not have jurisdiction over challenges to PAO).
[26] *Laurelhurst Community Club, et al v. City of Seattle,* CPSGMHB Case 03-3-0008 (Laurelhurst I); *Laurelhurst Community Club, et al v. City of Seattle,* CPSGMHB Case 03-3-0016 (Laurelhurst II).

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II. DISPOSITIVE MOTIONS

1. Motions to Dismiss for Lack of Jurisdiction – Black Diamond and YarrowBay

Both Black Diamond and YarrowBay seek dismissal of this matter based on a lack of subject matter jurisdiction. Black Diamond and YarrowBay contend that the Board does not have jurisdiction over the Ordinances, as the City's action involves two "project-specific" permits which are part of the City process allowed as an outgrowth of the approved Master Planned Development regulations and the City's Comprehensive Plan.[27]

Petitioners presented argument supporting jurisdiction in their dispositive motion which the Board includes in this section. Petitioners assert that the Ordinances are in fact development regulations and/or *de facto* comprehensive plan policies falling under the jurisdiction of the Board.[28]

Board Discussion and Analysis

A. Board Jurisdiction

RCW 36.70A.280(1) provides, in pertinent part, that the Growth Management Hearings Board (Board) "shall hear and determine" petitions alleging that "a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter [GMA] . . . or chapter 43.21C RCW [SEPA] as it relates to plans, development regulations, or amendments."

Under RCW 36.70A.290(1), the Board hears "[a]ll petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto is in compliance with the goals and requirements of [the GMA, SEPA, or SMA]."

"Comprehensive Plan" or "Plan" is defined in the GMA, RCW 36.70A.030(4):

> **"Comprehensive land use plan," "comprehensive plan," or "plan"** means a generalized coordinated land use policy statement of the governing body of a county or city that is adopted pursuant to this chapter.[29]

[27] Black Diamond Motion to Dismiss, at 1-2; YarrowBay Motion to Dismiss, at 1-2.
[28] Petitioners' Motion to Dismiss, at 1.
[29] Emphasis added.

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A comprehensive plan consists of a future land use map, planning elements, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan.[30] The GMA also authorizes the adoption of "subarea plans" that clarify, supplement, or implement jurisdiction-wide comprehensive plan policies within a discrete portion of a county or city.[31]

The purpose of a comprehensive plan or subarea plan is to provide guidance. It is the visionary framework or "blueprint" for the adopting jurisdiction. The comprehensive plan, in and of itself, does not directly regulate site-specific land use decisions. Rather, it is development regulations which directly control the development and use of the land. Such regulations must be consistent with the comprehensive plan and be sufficient in scope to carry out the goals set forth in the comprehensive plan. [32]

Development regulations are defined in the GMA, RCW 36.70A.030(7):

> "**Development regulations**" or "**regulation**" means the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. A development regulation does not include a decision to approve a project permit application, as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city. [33]

This definition uses the "including, but not limited to" clause, which provides a non-inclusive listing of types of development regulations.[34] However, the provision clearly states what is not a development regulation – "a decision to approve a project permit application, as defined in RCW 36.70B.020." RCW 36.70B.020(4) defines "project permit" or "project permit application" as: [Emphasis added]

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[30] RCW 36.70A.070.
[31] RCW 36.70A.080(2); RCW36.70A.130.
[32] *Woods v. Kittitas County,* 162 Wn.2d 597, 613 (2007)*;* RCW 36.70A.040 (Development regulations must implement comprehensive plan).
[33] Emphasis added. See also, WAC 365-196-800 ("Development regulations under the [GMA] are specific controls placed on development or land use activities by a county or city.")
[34] *Sherman v. Kissinger*, 146 Wn. App. 855 (2008) ("including but not limited to" indicates a legislative intent to include items beyond those specifically listed); *Coffey v. Walla Walla,* 145 Wn. App. 435, 441 (2008)(Listing in RCW 36.70C.020 is "illustrative rather than exclusive").

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> (4) "Project permit" or "project permit application" means any land use or environmental permit or license required from a local government for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site-specific rezones authorized by a comprehensive plan or subarea plan, but *excluding the adoption or amendment of a comprehensive plan, subarea plan, or development regulations* except as otherwise specifically included in this subsection.

Local land use decisions on "project permits" or "project permit applications" are not appealable to the Board but instead are filed in superior court as a "land use petition" under RCW 36.70C. Area-wide rezones are specifically excluded from the land use petition process in superior court,[35] as are local decisions that are subject to review by the GMHB.[36]

Thus, the jurisdiction of the GMHB is statutorily established by RCW 36.70A.280(1) and .290(1), as reinforced by the exclusions from the LUPA process in RCW 36.70C.020, RCW 36.70C.030, and RCW 36.70B.020(4). The GMHB has jurisdiction to hear appeals of local decisions on comprehensive plans, including subarea plans, and on development regulations,[37] including area-wide rezones. In contrast, the superior court hears appeals of project permit applications.

Petitioners contend that the Ordinances amend comprehensive plan policies and/or amend development regulations, giving the Board exclusive jurisdiction.[38] Both Black Diamond and YarrowBay contend that the challenged Ordinances are not development regulations but rather are project permits which the Board does not have jurisdiction to consider but which require a LUPA appeal to superior court.[39]

The Board finds guidance in the recent ruling of the Court of Appeals in *Davidson Serles & Assoc. v City of Kirkland*.[40] The Court had before it questions related to jurisdiction, including

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[35] RCW 36.70C.020(1)(a).
[36] RCW 36.70C.030(1)(a)(ii).
[37] Development regulations do not include a decision to approve a project permit application, as defined in RCW 36.70B.020. RCW 36.70A.030(7).
[38] Petitioners' Dispositive Motion, at 14.
[39] Black Diamond Motion, at 1-2; YarrowBay Motion, at 2.
[40] Court of Appeals Case No 64072-1-I (Jan. 24, 2011), Slip Op. at 12-14.

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whether design review guidelines for a Kirkland project amounted to a development regulation for which the Board has review authority under the GMA.

The Court began by distinguishing *development regulation* from *project permit application*:

> "The GMA defines what a 'development regulation' is and, more helpfully, what it is not." *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn. 2d 169, 178, 4 P.3d 123 (2000). A "project permit application" is not a "development regulation." RCW 36.70A.030(7). "The items listed under 'project permit application' are specific permits or licenses; more general decisions such as adoption of a comprehensive plan or subarea plan are not approvals of project permit applications." *Wenatchee Sportsmen*, 141 Wn. 2d at 179 (citing RCW 36.70B.020).[41]

The Court then looked at the Kirkland ordinance:

> Ordinance No. 4172, which incorporates the "Kirkland Parkplace Mixed Use Development Master Plan and Design Guidelines" into the Kirkland Municipal Code, provides the design review board with an additional set of design guidelines with which to review development permits. The Ordinance therefore contemplates that specific project permits will be sought in the future. The ordinance contains "controls placed on development or land use activities," RCW 36.70A.030(7), by the City but is not itself a specific "project permit," RCW 36.70B.020(4). The design guidelines were enacted to guide the development of Parkplace, and compliance with the design guidelines is required in order for a developer to obtain increased building heights and reduced setbacks. Ordinance No. 4172 controls height requirements and other aspects of development within the Parkplace area.[42] The design guidelines are "supplemental, not a substitution" to the City's municipal code and standard zoning regulations. [43]

On these facts, the Court concluded:

> Ordinance No. 4172 is more similar to a zoning ordinance or planned unit development ordinance than to a specific permit. This ordinance is a development regulation within the scope of the GMA.[44]

In the present matter, the Board must determine whether Ordinances 10-946 and 10-947 are "the adoption or amendment of a comprehensive plan, subarea plan or development

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[41] *Davidson Serles*, at 13.
[42] The Court's footnote 6 details elements of the ordinance requiring pedestrian-oriented spaces, LEED Gold design standards, street widths, parking, landscaping and sidewalk standards, screening of service loading and trash collection areas, and upper-level setback of taller buildings.
[43] *Davidson Serles*, at 13-14.
[44] *Davidson Serles*, at 14.

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regulations" – i.e. "controls placed on development or land use activities" - so as to be within the Board's jurisdictional authority.

Applying the criteria highlighted by the *Davidson Serles* Court, the Board notes that the Black Diamond Ordinances provide standards for review of future development. On the most basic level, the ordinances adopt Land Use Plan maps which place general land use categories on the land that was previously mapped MPD Overlay. The Land Use Plan map, adopted by reference in Section 3 of each Ordinance, delineates areas for low-, medium-, and high-density residential development, commercial/retail, mixed use, open space, and other designated land uses.[45] The findings in the challenged Ordinances contain numerous references to the incorporated land use map, indicating how these delineations will govern future project permit applications.[46]

The Ordinances "contemplate[d] that specific project permits will be sought in the future."[47] The Ordinances contemplate a variety of project-level permits such as subdivision approvals, binding site plans, building permits, and the whole range of development permits to follow. They spell out the processes for these project-level permits.[48]

Compliance with the Ordinances is required in order for YarrowBay to obtain subdivision approvals and other project permits.[49] Thus the Ordinances contain "controls placed on development or land use activities," RCW 36.70A.030(7), by the City but are not themselves a specific "project permit," RCW 36.70B.020(4).

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[45] App. D and E, Petitioners' Dispositive Motion; *see also* Ordinances 10-946 and 10-947; Motions Exhibit 1 Chapter 3 Land Use; Motions Exhibit 2 Chapter 3 Land Use.

[46] Land use maps are an essential component of comprehensive plans and subarea plans and may be an indicia of area-wide planning as well as constituting development regulations that govern future land use.

[47] *Davidson Serles* at 14.

[48] BDMC 18.98; Ordinance 10-946 Lawson Hills MPD, *see e.g.,* Conclusions of Law at 7, 8(C)-(E), 10(B); Conditions of Approval at 2, 4, 162, 163. Ordinance 10-947 Villages MPD, *see e.g.* Conclusions of Law 7, 8(C)-(E).

[49] BDMC 18.98.050. In adopting Ordinance 10-946 and 10-947, the Black Diamond City Council deferred action on additional proposed development standards and even on permitted, prohibited and conditional uses for each land use district. [Villages Condition of Approval 128.] Presumably, a further set of development regulations will need to be enacted. The City and YarrowBay propose to adopt these additional controls in the form of a development agreement rather than a zoning ordinance. [Ex. C, at 24-25.]

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In the light of the *Davidson Serles* analysis, the Board is compelled to conclude that the challenged Ordinances are not project permits but instead are "controls placed on development or land use activities." They are amendments to Black Diamond's development regulations for which the Board has exclusive review jurisdiction.[50] They might even be construed as in the nature of sub-area plans. In any event, they fall well on the GMA side of the jurisdictional dividing line.

Furthermore, land use maps are an essential component of every comprehensive plan or subarea plan and are good indicia of area-wide planning as distinguished from localized project permitting. The findings in the challenged Black Diamond ordinances contain numerous references to the incorporated "land use map" for the defined subarea. This mapping evidence also supports a conclusion that the Black Diamond ordinances functionally constitute subarea planning by the City, bundled with associated development standards that will govern future project permit applications (i.e., development regulations).

The dispositive motions of the City and YarrowBay, and their responses to Petitioners' motion, argue that Ordinances 10-946 and 10-947 are not development regulations but project actions. As set forth below, their contentions are without merit.

B. The label applied to a city or county action does not determine the Board's jurisdiction.

The City here argues that the petitioners used words denoting project actions throughout the public process and should not be allowed to change their position now and claim the ordinances are development regulations.[51] The City also points out the consistency of the quasi-judicial process used by City officials in considering the ordinances as demonstrating these were project permit applications.[52]

However, how the parties characterize the action does not determine the question of jurisdiction. The Board notes that the *Davidson Serles* Court focused on the substance and

[50] *Davidson Serles,* at 14; see also, *Coffey v. City of Walla Walla*, 145 Wn. App. 435, 441, 187 P.3d 272 (2008); *Woods v. Kittitas County*, 162 Wn. 2d 597, 614-615, 174 P.3d 25 (2007).
[51] Black Diamond Response to Motion, at 22-25.
[52] Black Diamond Response to Motion, at 9.

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effect of the ordinances before it.[53] The name and process chosen for the action may shape the question of jurisdiction, but does not decide it.

In *Alexanderson, et al v. Clark County*,[54] the court had before it a Memorandum of Understanding (MOU) between Clark County and the Cowlitz Tribe. The Growth Boards have frequently said that MOUs or Interlocal Agreements (ILAs) are not comprehensive plan or development regulation amendments, because intergovernmental agreements do not usually change the zoning or other controls on specific property. [55] However, in *Alexanderson*, the Court of Appeals found that a provision of the County/Tribe MOU was in direct conflict with the County's comprehensive plan. The court ruled that the MOU was a *de facto* amendment to the county comprehensive plan for which the Board had review jurisdiction. The *Alexanderson* decision made clear that determining whether an action is an amendment to a comprehensive plan or development regulation requires looking beyond labels to the substance and effect of the enactment.

The Board's rulings have also looked beyond labels. In *Skagit County Growthwatch v. Skagit County,*[56] the Board determined an administrative interpretation (AI) which changed the land use designation from Agricultural Resource to Rural Business actually amounted to a comprehensive plan amendment. The Board found the change in land use designation effectively amended the land use map which is part of the county's comprehensive plan and, therefore, the AI was a comprehensive plan amendment within the Board's jurisdiction. Based on the GMA and the County's own code, the Board concluded the County erred in utilizing the AI process for a change in land use designation.

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[53] *Davidson Serles,* Slip Opinion at 13-14.
[54] 135 Wn. App. 541 (2006).
[55] See e.g., *Burien v. SeaTac*, CPSGMHB Case No 98-3-0010, Final Decision and Order (Aug. 10, 1998), at 9 ("the ILA did influence but did not dictate the form, substance, and timing of some of the proposed … amendments"); *Petso v. Snohomish County*, CPSGMHB Case No. 07-3-0006, Order of Dismissal (Apr. 22, 2007) (resolution rescinding ILA not within Board jurisdiction); *Harless v. Kitsap County,* CPSGMHB Case No. 02-3-0018c, Order on Motions (Jan. 23, 2003) (MOA establishing regional planning process does not amend plan or regulations).
[56] WWGMHB Case No. 04-2-0004, Order on Motions (June 2, 2004); Final Decision and Order (Aug. 23, 2004).

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The principal of looking beyond labels to the substance and effect of ordinances applies to development regulations as well as comprehensive plan amendments. *Servais v. Bellingham*[57] concerned a Memorandum of Agreement (MOA) between the City and Western Washington University regarding future development of the campus under a Master Plan. Dismissal was sought based on lack of GMHB jurisdiction. The Western Washington GMHB concluded that the MOA was a development regulation. The Board noted the MOA established standards for the University's submission of project permit applications for a 12-month period:

> The MOA specifically references various Bellingham Municipal Code (BMC) provisions relating to criteria for approval of building projects. In addition to specifically adopting some parts of the current BMC, the MOA exempts WWU from certain requirements contained in other BMC sections.
>
> It is hard to envision how the MOA does not fit within the definition contained in RCW 36.70A.030(7) [Development Regulations] … We specifically find that the MOA is a development regulation and that we have jurisdiction to review the claims set forth in the PFR …

The Board reconsidered this holding in its Final Decision and Order, reiterating that the MOA was a development regulation:

> Thus, we are left with a record that reveals the adoption of a Plan specifically referencing a MOA, which by its terms directs and *amends* the adopted zoning code of the City of Bellingham, specifying the permit application and approval process for development projects on the WWU campus within the city limits of Bellingham. The MOA *implements* the Plan through a variety of zoning code applications and exceptions from BMC 20.12, 20.38, 20.40, and 20.42. It is hard to envision how this agreement does not fall within RCW 36.70A.030(7) which defines DRs as "…the controls placed on development or land use activities by a county or city…"[58]

Similarly in *Laurelhurst Community Club, et al v. City of Seattle (Laurelhurst II),*[59] the Board determined it had jurisdiction to review amendments to the City/University Agreement for the University of Washington. In a previous decision, the Board had ruled that the 1998 City-

[57] WWGMHB Case No. 00-2-0020, Order on Motion (Aug. 31, 2000).
[58] *Id.* Final Decision and Order, at 4 (Oct. 26, 2000).
[59] CPSGMHB Case No. 03-3-0016, Order on Motions (Dec. 2003), Final Decision and Order (Mar. 3, 2004).

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University Agreement was a development regulation.[60] The City and UW argued that the ordinance concerned "ownership and leasing" rather than "use and development," as the challenged amendments concerned use of off-campus lands. The Board disagreed, reasoning that the ordinance challenged in *Laurelhurst II*, by amending the 1998 Agreement, resulted in an amendment to a development regulation:

> First, the 1998 Agreement is *specifically* incorporated by reference into Seattle's Municipal Code as SMC 23.69.006(B) – one of Seattle's development regulations for major institutions. Second, the heading of the SMC section where reference is made to the 1998 Agreement is "Application of *regulations*." SMC 23.69.006, (emphasis added). These actions support the Board's conclusion that the City clearly has made the 1998 Agreement a development regulation since the City has adopted it in its *entirety* into its code.
> …
> Because the 1998 Amendment, by its explicit terms is intended to "govern . . . uses on campus, uses outside the campus boundaries, off-campus land acquisition and leasing . . ." the Board further concludes that it "*controls* . . . land use activities," per RCW 36.70A.030(7). Thus, the 1998 Agreement, codified at SMC 23.69.006(B), clearly has the effect of being a local land use regulation, subject to the goals and requirements of the GMA.[61]

In the case of Black Diamond, the MPD ordinances expressly displace any conflicting city code provisions: "When there is a conflict between the standards and this Agreement and the provisions of the referenced Black Diamond Municipal Code, this Agreement will prevail."[62] The Board must conclude that the ordinances "control land use activities, per RCW 36.70A.030(7)."[63] The Board does not see how provisions which supersede and replace city code provisions can be characterized as anything other than amendments to the City's development regulations.

In *North Everett Neighborhood Alliance v. City of Everett (NENA),*[64] neighbors challenged a rezone and master plan for a hospital campus, the city and hospital both asserting the actions were project permits. The Board held that the rezone required a comprehensive plan amendment and thus fell within the Board's jurisdiction. As to the Master Plan, the Board's

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[60] *Laurelhurst Community Club, et al v. City of Seattle (Laurelhurst I),* CPSGMHB Case No. 03-3-0008, Order on Motions, at 11 (June 18, 2003).
[61] *Laurelhurst II,* Final Decision and Order, at 14-15 (March 3, 2004).
[62] The Villages MPD Application, at 13-35.
[63] *Laurelhurst II*, at 15.
[64] CPSGMHB Case No. 08-3-0005, Order on Motions (Jan 26, 2009).

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finding that it was a development regulation was based on the requirement for master plans in the city's development code and the fact that project permits were to be phased subject to application of the provisions of the Master Plan.[65] The Board analyzed the language of the challenged ordinance to determine if the Master Plan, as part of the overlay zone, was a development regulation or a project permit. The Board noted the fact that the Master Plan was a requirement to the overlay zone under the City's development code; that the ordinance prescribes allowed uses, development standards, and design guidelines to be applied in review of future project permit applications; and that the ordinance specifies phased development with project permit actions subject to the Master Plan's regulatory requirements.

The Board in *NENA* distinguished *Laurelhurst I,* where the Board had classified the University of Washington Master Plan as a project level document.[66] The Board explained that the UW Master Plan was the equivalent of a preliminary site plan approval. The Board had noted in *Laurelhurst I* that the UW Master Plan "generally establishes the location, dimension and function of major structures on the University campus" and thus constituted a "'site plan approval' land use decision." [67] The Black Diamond ordinances at issue here do not establish location, dimension and function of major structures in the MPD, and even the developer does not argue that they are "the equivalent of preliminary site plan approval."

In the case before us, the Board is not persuaded by the City's lengthy references to either its own labeling of the actions undertaken or the remarks of the petitioners during the processing of the challenged ordinances.[68] As the Board stated in *Laurelhurst I*:[69]

> In making the determination of whether a local action is subject to the GMA generally and Board jurisdiction specifically, it is important to focus on the *substance* and *policy context* of that action, rather than the procedure employed or the label attached. Simply characterizing a local action as a

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[65] *NENA,* at 7-12.
[66] *NENA,* at 12. The Board does not now address the question of whether the Master Plan issue in *Laurelhurst I* was wrongly decided.
[67] *NENA,* at 12, citing *Laurelhurst I*, 03-3-0008, Order on Motions (June 18, 2003), at 10.
[68] The Board does not question the good faith of the City in seeking to process these ordinances as quasi-judicial project permits. However, there is no merit in the argument that petitioners somehow conceded to the City's characterization by using "project" or "permit" terminology in their public participation or legal actions.
[69] *Laurelhurst I*, at 11.

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> "master plan" or employing a quasi-judicial process, rather than a legislative one, is not determinative of whether the action is properly a policy or regulation subject to GMA or a permit action that falls beyond the pale of GMA compliance. That determination must be made after reviewing many facts and factors.

The GMA and the Court decisions require the Board to examine the substance and effect of the ordinances to determine whether they constitute "the adoption or amendment of a comprehensive plan, subarea plan or development regulations" – i.e., "controls placed on development or land use activities" – rather than project permits.

C. Petitioners were not required to challenge the 2009 ordinances.

YarrowBay argues that Petitioners should have appealed the MPD regulations adopted in 2009 if they believed the MPD process failed to provide appropriate land use controls.[70] But of course, it is not the general regulation adopted in 2009 that Petitioners object to. YarrowBay's attempt to paint this challenge as a collateral attack on the 2009 ordinances is without merit.

The Board notes that the 2009 MPD ordinances establish that the MPD lands shall be developed with a mix of residential and commercial uses, adding some provisions for higher density housing upon certain conditions.[71] Presumably interested citizens were aware that the MPD land was within the city limits and would be developed at urban densities with a mix of uses. They might reasonably conclude this was consistent with the GMA. Their presumed acquiescence in the earlier ordinance doesn't bar them from challenging subsequent ordinances that provide a Land Use Plan map and more specific level of detail about allowed uses and densities.

D. *2101 Mildred* and *Kent CARES* are not dispositive.

As noted *supra* in regards to procedural motions, Black Diamond's reliance on *2101 Mildred*[72] and *Kent CARES*[73] is misplaced as SEPA Planned Action Ordinances are not at

[70] YarrowBay Reply to Dispositive Motion, at 4.
[71] Codified as BDMC 18.98.120(A).
[72] *2101 Mildred LLC, et al, v City of University Place*, CPSGMHB Case. No. 06-3-0022, Order of Dismissal (Aug. 17, 2006) (planned action ordinance for Town Center).

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issue in this matter. Because the City relies so heavily on these decisions, the Board refers again to the recent ruling of the Court of Appeals in *Davidson Serles* which clarified the status of planned actions. The Court affirmed that the Growth Board does not have jurisdiction over challenges to planned actions, citing *2101 Mildred* and *Kent CARES*.[74] The Court looked to the statutory authority for planned actions in SEPA – RCW 43.21C.031(2) – and the procedures and requirements in the SEPA Guidelines at WAC 197-11-168 to conclude that the Board lacks jurisdiction. The Board finds no merit in Respondent's reliance on *2101 Mildred* or *Kent CARES.*

E. Consistency with the existing comprehensive plan is a relevant but not dispositive factor.

The definition of "project permit" in RCW 36.70B.020(4) includes "site-specific rezones authorized by a comprehensive plan or subarea plan." Thus, in determining whether a *site-specific rezone* is an amendment to development regulations reviewable under the GMA or a project action reviewable under LUPA, a key consideration is whether a concurrent comprehensive plan amendment was required.[75]

The City and YarrowBay assert that the MPD Ordinances must be project actions because they were "authorized by a comprehensive plan." The City and YarrowBay emphasize that no comprehensive plan amendment was required to support adoption of the MPD ordinances, as they were consistent with and implemented the comprehensive plan changes and MPD development regulations enacted in 2009.[76]

This, however, does not require the Board to conclude the MPD ordinances are project actions. It is only site-specific rezones that become project actions when authorized by a previously-adopted comprehensive plan or subarea plan. Other amendments to

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[73] *Kent CARES v. City of Kent,* CPSGMHB Case No. 02-3-0015, Order on Motions (Nov. 27, 2002) (planned action ordinance for Kent Station, a downtown mixed use project).
[74] *Davidson Serles, et al v City of Kirkland*, Court of Appeals No. 64072-1-I (Jan 24, 2011) Slip Op. at 14-21, (planned action ordinance for Parkplace, a downtown mixed use project).
[75] *Wenatchee Sportsmen v. Chelan County,* 141 Wn. 2d 169, 178, 4 P.3d 123 (2000; *Coffey v. City of Walla Walla*, 145 Wn. App. 435, 441, 187 P.3d 272 (2008); *Woods v. Kittitas County*, 162 Wn. 2d 597, 614-615, 174 P.3d 25 (2007); *Feil v. EWGMHB,* 153 Wn. App. 394, 408, 220 P.3d 1248 (2009).
[76] YarrowBay Motion to Dismiss, at 12.

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development regulations, including "zoning ordinances, … official controls, planned unit development ordinances, and binding site plan ordinances together with any amendments thereto"[77] may be adopted without amending comprehensive plans, without thereby becoming project actions.[78]

Ordinances Nos. 10-946 and 10-947 add specificity to the land use controls in the MPD Overlay, filling in the Land Use Plan map, and adopting additional standards. The fact that a comprehensive plan amendment was not required does not convert the ordinances to project actions.

F. Review of the MPD Ordinances is within Board jurisdiction

The Board recognizes it lacks jurisdiction to review specific development projects, which must be appealed under LUPA. The City's and YarrowBay's insistence that the Ordinances represent project permits does not hold up to scrutiny. The definition of "project permit" in RCW 36.70B.020(4) specifically "exclud[es] the adoption or amendment of a comprehensive plan, subarea plan, or development regulations except as otherwise specifically included in this subsection."

The Board finds Ordinances 10-946 and 10-947 have the characteristics of a sub-area plan, or, more precisely, amendment and adoption of development regulations for a subarea plan. The land involves 1,567 acres - about a third of the area of the city. Three non-contiguous sites, in different parts of the city, are included. The City's planning staff recognized that "the MPD proposal is similar to a 'subarea plan' that many jurisdictions use to provide greater definition to their comprehensive plans."[79]

In 2009, the City enacted an ordinance codified as Chapter 18.98 of the City Code, providing a first set of plan and regulatory provisions for the MPDs. With regard to allowable land uses in the MPDs, BDMC 18.98.120(A) states:

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[77] RCW 36.70A.030(7).
[78] If every regulatory amendment became a "project action" by virtue of being consistent with the local comprehensive plan, any challenge other than "inconsistency" would have to be appealed to the courts as a LUPA action.
[79] Petitioners' Dispositive Motions, Appendix H (page 3 of Staff Report for The Villages MPD).

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> MPDs shall include a mix of residential and non-residential use. Residential uses shall include a variety of housing types and densities.

Some conditions concerning infrastructure and open space were included, but no specific land uses, densities or mapping was enacted. Ordinances 10-946 and 10-947 amend this very general language by making the first basic decisions regarding allowable land use and locations, a fundamental planning and regulatory function. Thus the ordinances resemble sub-area plans. In *West Seattle Defense Fund I v. City of Seattle*,[80] the Board indicated that a neighborhood plan "by whatever name" is a GMA sub-area plan.

Each ordinance here creates new land use categories – various residential zones, a mixed use district, and a commercial district. Each ordinance adopts a new land use plan map that assigns the land use categories to specific areas. The ordinances adopt a multitude of regulatory controls.[81] Each ordinance defers to a later process the adoption of height limits, specific densities, allowed, conditional and prohibited uses in each land use district, and similar regulations.

In sum, the Board concludes that the MPD ordinances are more similar to sub-area plans or to development regulations as defined in RCW 36.70A.030(7) than to project permits as defined in RCW 36.70B.020(4). To echo *Davidson Serles*, the action of the City is "more similar to a zoning ordinance or planned unit development ordinance than to a specific permit."[82] The ordinances are not permits for project actions, but land use policies and "controls placed on development or land use activities." The ordinances constitute *de facto* subarea plans or *de facto* development regulations. The Board concludes these ordinances constitute "the adoption or amendment of a comprehensive plan, subarea plan or

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[80] CPSGMHB Case No. 95-3-0073, Final Decision and Order, at 19 (April 2, 1996).

[81] For example: requiring subdivisions to be designed for alley-loaded residential lots in most cases (Villages Condition 142, Lawson Hills Condition 147); allowing no more than 150 residential homes with a single point of access (Villages Condition 27, Lawson Hills Condition 25); requiring native vegetation in street landscaping and parks (Villages Condition 122, Lawson Hills Condition 125); creating parking standards for the Town Center (Villages Condition 148); limiting the number of floors of residential use above ground level commercial (Villages Condition 146); creating a distinct land use category to recognize potential light industrial uses (Lawson Hills Condition 144); adopting specific standards for stormwater management, water conservation, earth moving and grading (Villages Conditions 53, 60, 104, 107). Compare *Davidson Serles*, Slip Op. at 15, fn. 6.

[82] *Davidson Serles,* Slip Op., at 14.

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development regulations" within the scope of GMA for which the Board has exclusive jurisdiction.

Conclusion: As set forth above, the Board finds and concludes it has subject matter jurisdiction over Ordinance No. 10-946 and Ordinance No. 10-947. The City of Black Diamond's and YarrowBay's Motions to Dismiss are **DENIED.**

2. Petitioners' Motion RE: Public Participation – Issue 2

Although Petitioners presented three issues to the Board related to public participation, only one of those issues serves as the basis for Petitioners' motion – Issue 2.[83] This issue, as set forth in the Board's Prehearing Order provides:

> *Whether the City violated the public participation goals and requirements of the Act (RCW 36.70A.020(11) and RCW 36.70A.035) and the terms of the City's public participation plan when it treated the applications as project specific applications and precluded the petitioners from full access to their elected legislative representatives, the City Council?*

RCW 36.70A.020(11), is the GMA's Public Participation Goal and provides:

> Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

RCW 36.70A.035, the GMA's notice provision, provides (in relevant part):

> (1) The public participation requirements of this chapter shall include notice procedures that are reasonably calculated to provide notice to property owners and other affected and interested individuals, tribes, government agencies, businesses, school districts, and organizations of proposed amendments to comprehensive plans and development regulation …

[83] The December 29, 2010 Prehearing Order – at Issues 2, 3, and 4 – sets forth allegations as to public participation violations. Issue 3 related to preparation of the Findings and Conclusions subsequent to Council approval of the terms of the challenged Ordinances and Issue 4 related to modification of the proposal after close of public comment. Petitioner's Motion also sets forth an issue related to violation of RCW 36.70A.106, Notice to Commerce. However, this issue was sought via a Motion for Amend the Prehearing Order which was denied by the Board on January 18, 2011. Therefore, as is noted in Petitioners' Footnote 10 to its present briefing, this section of the brief is stricken.

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As for the City of Black Diamond's Public Participation Program, it is contained in Black Diamond Municipal Code (BDMC) 16.30.020 and BDMC 18.80.080. Those provisions provide as follow (in relevant part):

> BDMC 16.30.020 Comprehensive Plans:
>
> (a) When proposed adoption of the Comprehensive Plan, adoption of successive parts thereof, or an amendment to the Comprehensive Plan is under consideration, the Planning Commission shall hold at least one public hearing thereon, and notice of such hearing shall be given prior to the Planning Commission making a recommendation for City Council adoption. The notice shall be given pursuant to [BDMC 18.08.125].
>
> BDMC 18.80.080 Development Regulations:
>
> (B) Type 5 decisions require public notice as set forth in [BDMC 18.08.120], a public hearing before the City Planning Commission who will make a recommendation to the City Council, and broad public outreach prior to a decision by the City Council.

Petitioners entitle their motion as dispositive, but what they actually seek is a finding of non-compliance and early remand on this basis. Such a motion is permitted pursuant to WAC 242-02-530(6) which provides:

> Any party may bring a motion for the board to decide a challenge to compliance with the notice and public participation requirements of the act raised in the petition for review, provided that the evidence relevant to the challenge is limited. If such a motion is timely brought, the presiding officer or the board shall determine whether to decide the notice and public participation issue(s) on motion or whether to continue those issues to the hearing on the merits.

The Board has previously found that when there has been a violation of the public participation requirements of the GMA, the appropriate remedy is to remand the challenged ordinances to the jurisdiction so that the proper procedures can be adhered to.[84] Remand is

[84] *Petso v. City of Edmonds,* CPSGMHB 09-3-0005, Final Decision and Order (Aug. 17, 2009)(Finding failing to provide adequate notice resulted in remand to the city for compliance); *Kelly, et al v. Snohomish County,* CPSGMHB 97-3-0012c, Order (July 30, 1997)(Remanded ordinance due to failure to comply with public participation requirements as to notice); *Laurelhurst Community Assoc. v. City of Seattle,* CPSGMHB Case 03-3-0016, FDO (March 3, 2004)(Remanding ordinance for failure to adhere to GMA public participation requirements).

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appropriate because of the GMA is founded on the extensive provision of public participation in the adoption process.[85]

Petitioners assert the City, by processing the proposals as a quasi-judicial permit application rather than a legislative amendment to its comprehensive plan or development regulations has used the incorrect public process. Petitioners argue BDMC 16.30.020 specifies the notice and hearing requirements for proposed amendment to the comprehensive plan, including "successive parts thereof." Petitioners also cite BDMC 18.08.080(B) which provides the notice and hearing requirements for legislative amendments to development regulations. Under the BDMC, these types of actions are known as "Type 5 decisions".[86]

Petitioners argue that had the correct BDMC public process been followed, a public hearing would have been provided before the Planning Commission with its recommendations forwarded to the City Council.[87] Petitioners assert that because of the erroneous process the City followed, the City "established rules that greatly circumscribed the public's ability to communicate directly to the City Council".[88]

Black Diamond's primary defense is the lack of board jurisdiction but, alternatively, the City contends that no violation of public participation has occurred. The City argues it closely followed the requirements of BDMC 18.98.60, which sets forth its adopted public process for MPD decisions.[89] Black Diamond states that the MPD proposal was reviewed by the Planning Commission as well as by the City's Hearing Examiner, who held an open record public hearing.[90] In addition, Black Diamond notes that public hearings were held before the City Council.[91] Therefore, according to the City, its process provided numerous opportunities for public participation. Finally, the City asserts that contrary to the Petitioners' argument,

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[85] *See 1000 Friends of Washington v. McFarland*, 159 Wn.2d 165 (En Banc 2006) (holding King County's critical areas ordinance was not subject to referendum, due in part to the extensive provisions for public participation found in the GMA.
[86] BDMC 16.30, 18.08.
[87] Petitioners' Motion to Dismiss, at 13.
[88] Petitioners' Motion to Dismiss, at 23.
[89] Black Diamond Response to Motion, at 25.
[90] Black Diamond Response to Motion, at 25-26.
[91] Black Diamond Response to Motion, at 25-26.

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some of the Petitioners or their proxies did communicate directly with council members after the close of the MPD process.[92]

YarrowBay asserts the public involvement was "robust" and appropriate under the MPD process. YarrowBay further contends that under the Growth Management Act, there is no requirement for direct, individual engagement between citizens and elected officials.[93]

In reply the Petitioners reiterate that under BDMC 18.08.080 the amendment process includes a public hearing before the Planning Commission and the opportunity to fully engage or, as Petitioners state, "bat around" ideas with the Planning Commission and City Council.[94]

Board Discussion and Analysis

With the conclusion reached by the Board *supra* regarding jurisdiction, it is undeniable that the City of Black Diamond did not comply with its own adopted public participation procedures for GMA amendments as set forth in the BDMC. While the City did an accomplished, exceptional effort to involve the public through their quasi-judicial process related to MPDs, the City simply did not follow the process prescribed by either BDMC 16.30.020 (comprehensive plans) or BDMC18.08.080 (development regulation) amendments and, therefore, could not have been guided by RCW 36.70A.020(11) – the GMA's public participation goal. And, although notice was given as to the MPDs beyond that required for GMA amendments, this notice did not reasonably advise members of the public that the City was proposing to amend its comprehensive plan or development regulations as required by RCW 36.70A.035. As this Board has previously stated:[95]

> The bedrock of GMA planning is public participation. The GMA's public participation provisions require cities and counties to adopt specific procedures …Thus, a jurisdiction's failure to follow the public participation procedures it has adopted … constitutes non-compliance with [the GMA].

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[92] Black Diamond Response to Motion, at 26-27.
[93] YarrowBay Response to Motion, at 10-11.
[94] Petitioners' Reply.
[95] *The McNaughton Group v. Snohomish County,* CPSGMHB Case 06-3-0027, FDO at 22 (Jan. 29, 2007); See also, *McVittie v. Snohomish County,* CPSGMHB Case 00-3-0016, FDO at 16-25 (April 12, 2001), *Fallgatter v. City of Sultan,* CPSGMHB Case 06-3-0017, Order on Motions at 4 (June 29, 2006).

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The Board recognizes the process Black Diamond undertook in the adoption of these two MPD Ordinances, but it simply was not the correct process.

The Board notes YarrowBay is correct, there is no requirement for individual contact between citizens and elected officials under GMA public participation. However, the local legislative body is the final decision maker in any local land use policy decision. The City Council, as that legislative body, is elected by the public to make decisions. Often times, in an intense public process, citizens come to believe their personal viewpoint should control the outcome. Only one decision can be made and that falls to the legislative body. However under the City's own rules, the Planning Commission is to hold a properly noticed public hearing to take public comment and formulate recommendations to the City Council. This was missing from the present matter.

Conclusion: Petitioner's Motion in regards to Legal Issue 2- Public Participation is **GRANTED**. The Board finds and concludes the City of Black Diamond failed to comply with its adopted public participation procedures as set forth in BDMC 16.30.020 (comprehensive plans) or BDMC 18.08.080 (development regulations). This failure results in enactments which were not guided by RCW 36.70A.020(11) nor did they provide reasonable notice as required by RCW 36.70A.035. Therefore, the Board remands Ordinance No. 10-946 and Ordinance No. 10-947 to the City for compliance with the GMA.

Given this remand, the Board is not addressing the other substantive issues presented by the Petitioners in regards to the challenged Ordinances at this time. Upon completion of the appropriate procedures for GMA amendments, the Board envisions some, if not all, of the Petitioners' concerns may be resolved during the opportunities for public participation afforded by these procedures. In addition, the City of Black Diamond will need to enact new legislation and it is from that legislation any subsequent appeal may be made via the filing a of new Petition for Review.

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III. INVALIDITY

In their Petition for Review and their dispositive motion, Petitioners request the Board invalidate the challenged Ordinances because they substantially interfere with the GMA's public participation goal – RCW 36.70A.020(11). RCW 36.70A.302 provides, in relevant part:

> (1) A board may determine that part or all of a comprehensive plan or development regulations are invalid if the board:
>
> (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
>
> (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of [the GMA] …

The Board concluded above that Black Diamond's adoption process for the challenged Ordinances failed to comply with its own public participation program for GMA amendments, BDMC 16.30.020 or BDMC 18.08.08 and thus was not guided by the GMA's public participation goal. However, although public participation is a bedrock principle of the GMA, the City of Black Diamond did afford extensive opportunities for public participation related to the MPDs. In addition, the Record demonstrates that the public, including the Petitioners in this matter, fully availed themselves to those opportunities. On these facts, the Board does not find that continued validity of the ordinances represents a substantial interference with Goal 11 of the GMA. Therefore, the Board declines to enter a Determination of Invalidity.[96]

IV. ORDER

Based upon review of the GMA, Board's Rules of Practice and Procedure, briefing and exhibits submitted by the parties, case law and prior decisions of the Board and, having deliberated on the matter, the Board enters the following Order:

[96] Petitioners' Supplement Exhibit C.

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1. Petitioners' Motion to Supplement the Record is GRANTED.
2. Petitioners' Motion to Strike is GRANTED.
3. Black Diamond's Request to Supplement the Record, as to Exhibit E of Sterbank Declaration I, is GRANTED.
4. Black Diamond's and YarrowBay's Motions to Dismiss is DENIED.
5. Petitioners' Motion in regards to Legal Issue 2 – Public Participation is GRANTED.
6. Ordinance No. 10-946 and Ordinance No. 10-947 are remanded to the City of Black Diamond so that it may take legislative action to achieve compliance with the GMA pursuant to this Order.
7. The City of Black Diamond shall take action with 75 days[97] and the following compliance schedule shall apply:

Item	Date Due
Compliance Due	April 29, 2011
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	May 6, 2011
Objections to a Finding of Compliance	May 13, 2011
Response to Objections	May 20, 2011
Compliance Hearing – Telephonic **Call 360 407-3780 pin 749319#**	May 24, 2011 10:00 a.m.

DATED this 15th day of February, 2011.

_____
Dave Earling, Board Member

_____
Margaret Pageler, Board Member

_____
Raymond Paolella, Board Member

Concurring Opinion of Boardmembers Earling, Pageler, and Paolella:

Because this comment does not bear on the outcome of the case, the Board writes separately to comment on the decorum of the attorneys in this matter. Generally, the Board expects and receives briefings from attorneys that are factual, straight forward, professional,

[97] Pursuant to RCW 36.70A.106(3)(b), expedited review may be sought before the Department of Commerce.

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and respectful of differing viewpoints expressed in a case. The current case before the Board is an exception. The sarcasm, disrespect, and foolish quotes to make points, add little to the briefing. Assuming the case continues in some fashion, the Board requests the attorneys reset their attitudes and return to the level of professionalism we are sure they expect of themselves and their counterparts.

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.[98]

[98] Pursuant to RCW 36.70A.300 this is a final order of the Board.
Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.
Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.
Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

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